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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

157 & 158.

NOS. ~~314~~, ~~315~~.

EMMA S. FAYERWEATHER AND ANOTHER,
COMPLAINANTS, APPELLANTS,

against

THOMAS G. RITCH AND OTHERS, DEFENDANTS,
APPELLEES.

MEMORANDUM FOR APPELLANTS IN SUPPORT OF MOTION OF APPELLEES TO ADVANCE THIS CAUSE FOR HEARING.

ROGER M. SHERMAN,
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City Hall, Mount Vernon, New York.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C. 10036

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1903.

No. 514.

EMMA S. FAYERWEATHER AND MARY W. ACHTER, APPELLANTS,

against

THOMAS G. RITCH AND OTHERS, APPELLEES.

No. 515.

JOHN B. REYNOLDS, AS EXECUTOR OF LUCY FAYERWEATHER, DECEASED, APPELLANT,

against

THOMAS G. RITCH AND OTHERS, APPELLEES.

REPLY OF APPELLANTS TO MOTION OF APPELLEES TO ADVANCE THIS CAUSE.

The appellants unite in the prayer that this cause be advanced for hearing and heard in May or as soon thereafter as may be.

But not all or the most potent of the grounds for the motion are set forth in the moving papers, and appellants respectfully ask consideration of the reasons following:

Upon this record from the United States circuit court in New York an appeal directly to this court has been allowed, because there is set up in the bill and disallowed by the terms of the final decree a claim which involves the construction and application of the fourteenth amendment.

That claim is that the basis of the decree below, that the determination of the State courts of New York was an adjudication of appellants' rights, was a construction which deprived them of their property without due process of law. Their claim had been sustained below by Circuit Judges Wheeler and Lacombe and denied by Judges Wallace and Shipman. The appellees have, in the motion papers here, alluded only to that claim. They have ignored the other contention, now to be urged in support of the motion to advance this cause.

The case presented below was one where heirs-at-law of Fayerweather and legatees under his will had been made defendants in a suit in the State court, brought by Amherst College and four other colleges, concerning the construction and effect of a will.

These appellants, as defendants therein, set up that one-half of the estate of Fayerweather was devised in violation of the New York statute of wills; that by force of the statute one-half of the estate passed to these appellants, as next of kin, as in case of intestacy; that a devise of that one-half, made in form absolute, to the executors named in that will, was controlled by a trust created by a secret agreement engrafted upon the devise to accomplish the end forbidden by the statute, and that this secret agreement was a mere cover for a fraud on the statute of wills. Appellants set up that their consent to probate and their release, obtained by these executors from them, were procured by fraud and the withholding and misrepresentation of material facts, and should be annulled. They prayed that they should be awarded their one-half of the estate.

The litigation in the Five College action, be it noted, was one necessarily assuming the *factum* of the will and only concerned with its construction. Therein the State court had no other jurisdiction.

Chipman *v.* Montgomery, 63 N. Y., 229 to 237.
Sheridan *v.* Houghton, 84 N. Y., 643.

The rights of these appellants were disposed of in the State courts by a course of logic which this court declared deprived such a case of all effect as an adjudication of a subject disregarded and ignored by the court, whose judgment was set up in bar.

Stark *v.* Starr, 94 U. S., p. 486, approved 154 U. S., pp. 124 to 129.

The State trial court disposed of appellants' claim by holding that the "secret trust" was not a fraud upon the statute of wills; that one-half the estate was effectively disposed of outside the statute of wills; that these appellants never had anything to release; that the small sum of money paid them—one-tenth, as it turned out, of their own money—as the purchase price of the other nine-tenths, was money found so far as they were concerned, and that therefore no case of fraud perpetrated upon them could arise; hence the trial court declined to *consider* the issue tendered by them. This became "the law of the case" in the State court. If it remained the law of the case, the effect of the provisions of the will would have been adjudicated, and the action at bar, so far as the rights resting upon the will in question are concerned, could not have arisen.

But that did not remain the law of the case. It was, on appeal, reversed; but the judgment, by a violation of every conception of due process of law, was nevertheless affirmed. Every consideration of substance required that when the law of the case was reversed and the issue "not considered" at the trial term, by the application of this bad law, became

an issue of the very essence of any possible judgment, then and in that case the issue should have been *considered and decided, as matter of fact, upon the merits.* That has never been done, and this suit was brought to secure such a decision.

The appellate State court, so far from affording us a trial of that issue, held that the judgment placed by the trial court upon the utter immateriality of the issue so tendered, and therefore "not considered," sufficed to conclude these appellants upon the merits of the question so eliminated.

The monstrous injustice was thus built upon this logical absurdity of adjudging the residuary estate to the colleges upon grounds hostile to their claim. They had come into court upon their pleadings and their contention, successful in the lower State court, that appellants had nothing to release, and it was held on appeal that these colleges *owned the residuary estate by force of the very releases* which they assailed. The colleges contended that the releases rested upon no valid basis, and appellants charged that they were fraudulently obtained.

There was a subsequent difference of opinion in the State courts as to whether these releases operated as conveyances or otherwise. It remained, however, for a Federal judge, Hon. Hoyt H. Wheeler, to declare as the law of this case, after six months' careful consideration, following full hearing of a demurrer to the bill of complaint, that the question presented in the bill at bar was never determined, or if it was it was by a course of logical devices which deprived appellants of due process of law. Judge Lacombe followed this decision. It was reversed upon an interlocutory appeal by Judges Wallace and Shipman upon general suggestions that the interest of the Republic required us to submit to the injustice and give controlling effect to the forms which had been followed.

The formal procedure in this case was substantially as follows:

The bill of complaint herein was brought against Ritch, Buckley, and Vaughan, individually and as executors, and against twenty colleges and charitable institutions, to obtain an accounting and decree for payment to the widow and next of kin of Daniel B. Fayerweather of $3,000,000, the amount of his residuary estate under a probated will. In another aspect it sought to annul certain judgments of State courts, as between the parties to this suit, as forms resting upon a denial to complainants of the right to a day in court in depriving them of their property in said estate and as violative of the fourteenth amendment.

The defendants relied upon the plea of *res adjudicata* by the judgments assailed. This contention was overruled on demurrer by Judge Wheeler, in which he was followed by Judge Lacombe, who granted an injunction *pendente lite* tying up $3,000,000.

Upon interlocutory appeal from the order, Judges Wallace and Shipman, holding the circuit court of appeals, reversed the law of the case, as solemnly adjudged on demurrer, and held that their two colleagues were wrong. This decision violated the settled rule, not previously disregarded, that the law of the case settled on demurrer must be followed until overthrown by a higher court upon a direct appeal from a final decree.

But Judge Lacombe yielded that formal respect to the reversal due to the fact that the two judges who reversed were sitting in the circuit court of appeals, nevertheless declining to accept their views except as he was constrained by that circumstance.

At this stage there came into the case, by amendment of the original bill and by two cross-bills, an assault upon the *factum* of the will and the probate decrees as obtained by contrivance and fraud. Upon an election to rely upon their previous defenses, the defendants did so, and the new feature of assault upon the validity of the will and probate was dis-

posed of upon a supposed lack of jurisdiction in the circuit court in anywise to deal with the subject-matter.

The assignments of error very fully raise all the points herein set forth.

These considerations are appellants' contribution to the grounds upon which this cause should be advanced for hearing.

If the amount involved (at least $6,000,000 today) and these extraordinary circumstance do not justify advancing this cause, yet the public concern which is inseparable from the speedy decision of the other question seems to justify and require it.

That question may be thus stated:

Has the circuit court of the United States jurisdiction to adjudge a will and its probate as between the parties to the record to be null and void when obtained not only by fraud in the execution of the will, but also by contrivance and fraud in and about the procurement of the decree of probate, where there is the requisite diversity of citizenship, where the amount involved is $6,000,000, and where the remedy invoked in equity in the circuit court is one authorized and applied, under the same circumstances, in the State courts of general, equitable jurisdiction?

The question arose in this cause, and it was decided below in the negative on January 17, 1902.

It has since been decided in the affirmative by the circuit court of appeals in the seventh circuit (May 6, 1902) in Williams *v.* Crabb, 54 C. C. A., 213, and by the circuit court of appeals in the eighth circuit in Sawyer *v.* White, 58 C. C. A., 591.

As the court points out in Williams *v.* Crabb (p. 218):

"So far as the Supreme Court has spoken on the subject, if it cannot be said to be fairly adjudicated, it has clearly been in favor of the jurisdiction."

But that court also points out that the following cases support the contrary view, and that view is the one taken in the court below in this case.

Oakley *v.* Taylor, 64 Fed., 245.
In re Cilley, 58 Fed., 977.
Reed *v.* Reed, 31 Fed., 49.
Wahl *v.* Franz, 40 C. C. A., 638.

In the case at bar the question arose and was disposed of as follows:

The original bill of complaint was amended so as to set up circumstances which assailed the will and its probate.

The cross-bill of Mrs. Fayerweather's executor, Reynolds, was aimed directly to that end.

Transcript of Record, vol. 1, pp. 267 to 275.

It must be conceded that, upon the merits of these averments, the relief prayed must follow, if the circuit court has jurisdiction.

It must be conceded that any adjudication in the Amherst College action, not affecting the *factum* of the will, could not be a bar to these averments, which cut under and assail the *factum* of the will and the integrity of its probate.

It must be apparent that if the release and consent to probate stand in the way of any statutory exercise of jurisdiction by the probate court (in New York, the surrogate's court), then a court of general equity jurisdiction could annul the release and the consent to probate and retain jurisdiction to give complete relief.

If so, the cross-bill is well conceived, irrespective of any question of adjudication arising from the judgment in Amherst College *v.* Ritch.

We proceed to show herein:

1. That the circuit court disregarded all the matters aimed at the *factum* of the will and its probate upon the sole ground that it had no jurisdiction.

2. That the surrogate's court had jurisdiction by a proceeding independent of the probate proceeding, amounting in effect to an independent suit *inter partes*, upon the facts alleged, to have annulled the decree of probate and the will.

3. That the existence of the release and consent to probate, however, was an obstacle to the exercise of this jurisdiction which conferred authority upon the supreme court of New York, under its chancery powers to entertain a suit in equity, to accomplish precisely what is sought by the amended and cross bills in this suit.

The consequence is that, the point of jurisdiction having been wrongly decided in the circuit court, the decree must be reversed upon that branch of the case, at least.

One Fiero filed a cross-bill herein, substantially in this regard like Reynolds' cross-bill.

See Transcript, vol. 1, pp. 328 to 337.

This bill was stricken from the files "upon the sole ground that this court has no jurisdiction to grant the relief prayed for in the said cross-bill or any of it."

Transcript, vol. 1, p. 346.

Do not the averments and prayer for relief create a valid suit *inter partes* in New York? Let us show that they do so.

The New York statute confers authority upon the surrogate—

"To open, vacate, modify or set aside or to enter as of a former time, a decree or order of his court; or to grant a new trial or a new hearing for fraud, newly discovered evidence, clerical error or other sufficient cause. The powers conferred by this subdivision must be exercised only in a like case and in the like manner, as a court of record and of general jurisdiction exercises the same powers."

N. Y. Code of Civil Procedure, section 2481, subd. 6.

So far as this section embraces vices in form, to that extent it may be conceded to be merely a continuation of the original probate proceedings; but it has in its nature then changed from an *ex parte* proceeding to one *inter partes*.

But in the larger view involved here the section relates not to incidents of the original proceeding, but to a separate, substantive, special proceeding, tantamount to a bill in equity to set aside a decree for fraud in its procurement. In that aspect it has all the characteristics, incidents, and effect of a suit *inter partes*, and falls within the reason of the decision in Williams *v.* Crabb, *supra*.

Matter of Tilden, 98 N. Y., pp. 441 to 444.
Matter of Hawley, 100 N. Y., pp. 210 to 212.
Hoyt *v.* Hoyt, 112 N. Y., pp. 507, 508.

Under the New York law, however, the surrogate has no general equity powers and probably could not deal with the consent to probate and release which stand at the threshold of any application to him.

The deduction is, and it has the support of the highest State authority, that the remedy in the State supreme court exists by a suit in equity to assail the consent and release, whereupon that court could grant relief as herein sought.

Sanders *v.* Sautter, 126 N. Y., 193.

The decree below, not being supported by any valid plea or answer to that feature of the amended bill and cross-bill, rests wholly upon an erroneous view of the jurisdiction of the circuit court. That question, being one answered differently by the lower Federal courts, ought to be set at rest by this court, and the hearing ought, to that end, to be advanced.

Appellants urge that the hearing be not later than May, if that be feasible.

ROGER M. SHERMAN,
Of Counsel for Appellants.

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Supreme Court of the United States.

EMMA S. FAYERWEATHER and MARY W. ACHTER,
Appellants,

vs.

THOMAS G. RITCH *et al.*, individually, and as Executors, &c., and others.

No. 157.

JOHN B. REYNOLDS, as Sole Executor of the Last Will and Codicil of Lucy Fayerweather, deceased,
Appellant,

vs.

THOMAS G. RITCH *et al.*, individually, and as Executors, &c., and others.

No. 158.

MEMORANDUM for Cross-Complainant IN SUPPORT OF Motion TO ADVANCE this Case upon the Calendar.

This is a motion to advance the hearing of this cause.

When is such a motion granted?

Rule 26, Subdivision 6 provides, as follows:

"All motions to advance cases must be printed, and must contain a brief statement of the matter involved, with the *reasons* for the application. 7. No other case will be taken up out of the order of the docket, or be set down for any particular day, *except under special and peculiar circumstances*, to be shown to the Court."

The *reasons* shown in the moving papers are, in substance,

1. That this is a suit to determine who owns the residue of the estate left by Daniel B. Fayerweather.

2. That that title was tried before Justice Truax,—sitting as a Chancellor,—in the N. Y. Supreme Court.

3. That judgment was rendered by him in favor of the 20 Colleges, named in the 9th, Paragraph of his Will.

4. That the General Term of that Court, and the N. Y. Court of Appeals affirmed that judgment; and ordered the executors to distribute said residue to said 20 Colleges.

5. That the Bill, in the present suit in equity, asks to set aside the Surrogate's decrees—which admitted said Will and 4 of its codici ls to Probate. Also to set aside said judgment.

6. That there is a Cross-Bill by the Executor of the Widow of said testator,—the contents of which are not stated;

7. That defendants filed a special Plea to said Bill and Cross-Bill, setting up said State judgment as *res adjudicata*.

8. That this estate has been in litigation ever since said Testator died, Nov. 15th, 1890.

9. That the 20 colleges ask final distribution under said decree.

10. That the heirs and the Widow's Executor insist that, if Ritch, Bulkley and Vaughan so distribute—they will do so at their peril.

11.

Complainants do NOT oppose this motion.

They desire *that it may be granted.*

They *also* offer a *reason—not* in said moving paper, namely: That while, among other things, the Bill seeks to *set aside* a will; it also seeks to *establish* one.

That—perhaps because the question has never been squarely here—the decisions of this Court leave some doubt if a Circuit Court of the United States, in a suit where there is,—1.—the requisite *diversity* of citizenship;—2.—a *Constitutional* question;—under its *general Equity* jurisdiction, may *set aside* a will, and *establish* another,—if such a course proves necessary *to do justice.*

Mr. Sherman's Brief deals with *this* point.

In short, defendants' reasons for advancing are

I.—That there was a trial of the title to this residuary estate; a judgment; an affirmance.

II.—That said judgment is a bar to the present suit.

Complainants' reason is, that—in a case of the celebrity of this—there is rare opportunity to set at rest a highly important question as to the jurisdiction of Federal Courts, in a class frequently occurring all over the land; and often involving large interests, between citizens of different States.

It may be that *additional* reason can be shown to the Courts.

Defendants say that the question of title is *res adjudicata*, because, between the same parties.

"The cause *was tried* before Justice Truax."

"And *judgment* rendered."

Their case rests then upon

I.—The fact that it *was tried*.

But if it was NOT tried, upon what does it rest!

What are the facts?

That in a suit by the 20 colleges against the 3 Executors and others, asking that a trust be impressed upon the residue in the hands of the Executors,—the Executors denied *any* trust.

And swore that *they* 3 owned it, *absolutely*.

Defendants claimed that the specific bequests of $2,195,000, to the 20 Colleges and 5 Hospitals, were legally willed.

And that bequeathing *the residue*, less the small personal bequests—to Ritch, Bulkley & Vaughn, even though they *had* first promised, that if he would so give it to them, they would get it *to said 20 Colleges*—was *not* WILLING it to Colleges.

Hence that it did not offend against Chap. 360 N. Y. Stats. of 1860, which forbids a man, who has a wife, to *will* over half his estate to such institutions.

In short, that willing half to Colleges, and half to individuals,—no matter if it was to be their own, or if they were a mere pipe to get it to *such* institutions,—did *not* break said law.—Because he did not WILL over half to colleges.

In vain, we urged, that you cannot do *indirectly*, what you cannot do *directly*.

That the *real* recipients and owners were, *not* Ritch, Bulkley and Vaughan at all, But the 20 *Colleges*—To whom said law forbade him to so give.

Justice Truax was firm that *that* was not WILLING it to colleges.

Naturally, *so* holding, he found that, save the small personal bequests the widow and kin took *nothing*.

And that, if they released,—they released *nothing;*—for the obvious reason that they *had* nothing *to release*.

And were fortunate to get *anything* for *such* releases.

Justice Truax's words upon this are easy to understand.

In his Opinion (Vol. IV, page 49) he says:

"In the view I have taken of the law of the case, that payment was made from the fund" (the residue) "THAT BELONGED TO THOSE (20) institutions ALONE."

(Nothing here about it's belonging *to the widow and heirs*.)

Again upon page 50:

"The view that I have taken of the facts and of the law of this case, renders it *unnecessary* for me TO CONSIDER the very interesting questions of law propounded by the learned counsel for the defendants Reynolds, Achter and Fayerweather."

Does this mean that he DID consider said questions?

Defendants say that it *does* so mean. They have always, and at every tribunal so insisted. That insistence has aided them to keep this property.

Since this suit was commenced,—satisfied that there was *one* man who *knew* whether Justice Truax *had* considered, and passed upon, the validity of said releases,—I took the unusual course of going to Justice Truax, and asking him if he *had* done so. And if he would, in aid of the truth, state before the Examiner here, if he *did* so consider.

He came at once.

Upon page 523 of Volume II, in reply to the question as to said last passage from his Opinion,

"Is that language in the Opinion intended to express the idea that you did NOT *consider and decide*, either the law of the facts, in relation to the VALIDITY of the releases?"

He replied:

"I think that THAT *should be* the view above, or the view stated above, that I HAD taken."

Upon the same page he continues:

"As I remember now, the heirs, Reynolds, Achter & Fayerweather, sought to set aside certain releases, upon the ground that those releases had

been obtained by fraud, or deceit; and one of the principal claims they made, one of the principal evidences of fraud, was the gross inadequacy of the consideration. Under *my* view of the law, *they got* $310,000, FOR NOTHING. THEY DID NOT HAVE ANYTHING TO RELEASE. And NOT having ANYTHING to release, they got more than they were *entitled to*, when they got the $310,000. So it was UNNECESSARY for me to consider, as I thought, ANY of the questions propounded by them. * * * Page 525. "I thought *they* had NO interest in the estate * * * for the reasons that I have stated, because it went either under the deed of trust? or the will, to somebody ELSE; that is, *part* of it went under the *will*, and another part of it went under the secret agreement or the secret trust."

Notwithstanding then his own sworn words,—*uncontradicted* by a single syllable of proof,—that he did NOT consider the validity of the releases

Or decide as to that validity;

Notwithstanding that his position is perfectly *consistent* throughout, that, as ALL was legally willed *else*where, these ladies had "NOTHING" to release;

And got "FOR NOTHING" whatever they got for releasing;

His saying that, as they had nothing to release;

And so got this money *for nothing*, it was clearly *unnecessary* for him TO CONSIDER SUCH releases;

His finding that the $2,100,000. went to the 20 Colleges; under the specific bequests; and the *residue* to them *also*, under the secret trust,—(born of the promise of these 3 men to get it to the 20 colleges);

Notwithstanding these things—they insist that he must at the same time have found exactly *the*

opposite, namely, that it did *not go in that way at all;*

That it went exactly the *other* way; namely as the upper Courts held that it did, the moment the testator died, to wit as property *unwilled;* And so became the property of the widow and heirs.

That *they owned it absolutely* for the 6 months and 27 days from his death November 15th, 1890 until the date of their releases,—June 12th, 1891;

That they parted,—not with what he says he found that they did *not* own, but with what they *did* own,—until they legally parted with it;—

Then released it;

That said releases are valid,

And that he decided them to be so.

If he *did*,—there must be *proof* of it somewhere.

Where *is* it?

Do you find it in Justice Truax's *own* sworn words?

Do you find a hint even, in his opinion anywhere, that he did *exactly the opposite of* what he swears that he did?

That he *did* consider that *validity?*

That he *examined and weighed the evidence* for and against it?

Found which *preponderated;* And said so?

No such proof has *ever* been even suggested to us.

Would it not be forthcoming *by now*,—if it *existed?*

If it *does*—will defendants point it out?

These ladies, and we their counsel, have *never* heard of any such thing.

And it is exceedingly probable, never *will* hear of it.

We know of *no* reason to think that they *ever* will. But of *many* reasons that they *never* will.

But defendants are sure that he *did* consider the validity of these releases,—though he swears that he did *not*,—because they say that it *was necessarily involved* in his decision that the residue belongs to the 20 Colleges.

And how could it *belong to them* and not belong,—not to them, but to the ladies instead?

This has to do with the *decision*. Not with the *trial* of the case.

On its face it looks reasonable.

If finding that these releases are valid, *was* necessarily involved in his decision.

What does *necessarily* mean?

The Standard Dictionary defines thus:

"NECESSARY. Inevitable. That cannot be otherwise."

The position is—then, that he could not have held it belonged to the *colleges;* without holding that the releases *were valid.*

That he could not have reached a certain decision, without having considered a certain thing—namely that *validity.*

But the answer is obvious.

He DID. That is all there is to it.

He *swears* that he *did* reach that decision, *without* considering that validity.

What possible construction of his words can mean anything *else?* He is perfectly frank about it,—as he always is.

Can one not decide that a horse is A's instead of B's where both claim him,—WITHOUT looking at B's proofs? But only at A's?

It would be a novel "decision" to be sure—one a person would hardly boast of. But such as it was, —would it not be a so-called decision?

On defendant's theory, it would *necessarily involve* that it was *not* B's—if it was A's.

Until one thing—until he who made it stated that he had *not* opened, or looked at *B's* proofs. But *only* at A's. *Then*, it would be seen at once that, instead of it being *necessarily* involved that it was not B's—it would *not* be involved *at all.*

That it was *never* even looked at.

The *omitted thing*, in the necessarily-involved theory, is that the judge *must have in fact considered*, what it is claimed was necessarily involved. But when he comes and swears that he *never* did consider it, and no word of proof is offered to the contrary;

What shows that he *did* consider it all?

Instead of it being inevitable, that he did;

Instead of, as the definition says, it being a thing "*that cannot be otherwise;*" here comes the Judge himself, and solemnly swears, that it was *entirely* otherwise.

Is *more* needed? Is it not obvious that he *never* considered that validity?

And if he did *not.*

And that residue—less said personal bequests—belonged to these ladies from the moment the testator died until *they legally* parted with it. And the only way ever suggested that they parted with it, is by these releases.

And to this day he has *never* considered that validity.

And *he* was the *trial*-Court.

And there is no suggestion of any *other* Trial-Court.

Did the Trial-Court in said Five College suit, "*try*" the validity of those releases?

Did it *consider* that validity?
Did it *pass upon* that validity?
If so, where? When? By what *words*, or act? It swears that it did *not*.

As this residue—less said specific bequests, personal bequests—belonged to the widow and next-of-kin from the testator's death;
And is theirs to-day—unless they have *legally* parted with it;
And when, in the State Court suit, the 20 colleges claimed it from,—not us, but the executors;
And the latter swore that—not as executors, but individually—*they* 3 owned, *owned* it, absolutely;
And both sets of said claimants *rely upon* our releases being *valid;*
Or see that their claim must fall;
Would you not call the issue we there raised, namely: that these releases were invalid, illegal, gotten by fraud, void—a *material* issue?

As it is conceded that this residue got *into* us rightfully—is not the issue how it got *out of* us, not only *material*—but the CHIEF issue in determining who owned that residue?
If not—what *would* be?

And, if this HINGE-ISSUE was NOT CONSIDERED by the trial-Judge at all;
And he did *not* think that it was in the case;
And *swears* that he did *not;* though it *was* all the time;
Would you say that this case "was *tried*"?

Is further proof or argument needed that the

Trial Court decided the question of the title to this residue without consideration of this;

The principal issue of the testimony bearing upon it; and so *without a hearing* of this issue at all?

Why then, are not the decisions of this Court in such cases, applicable here?

In a recent leading case the Trial Court, after summoning the defendant—(*we* were summoned)

Refuse to allow him to answer;

Struck his answer from the files;

Suppressed the testimony supporting it;

And condemned him without consideration thereof;

And without a hearing;

On the theory that he had been guilty of contempt of Court.

That was strenuous treatment;—rather of the sapping and mining order;—less polite than we had.

But what difference did the veneering of polish make upon *the result?*

The result in *his* case was, that he was condemned, *without a hearing.*

In our case that our property has been taken from us *without a hearing;*

Both reach the same port;

One had smoother seas than the other.

But each got there, just the same.

How this Court deals with such "a trial" will appear from its own words in

HOVEY *vs.* ELLIOTT, 167 U. S., 413; where the decision of the Court was rendered by WHITE, J., thus:

"A more fundamental question yet remains to be determined. That is, whether a Court, possessing plenary power to punish for contempt, unlimited by Statute, HAS THE RIGHT to summon a defendant to answer; and then, after obtaining jurisdiction, by the summons, REFUSE TO allow the party summoned to answer; or strike his answer from the files; suppress the testimony in his favor; and condemn him WITHOUT CONSIDERATION THEREOF; and WITHOUT A HEARING; on the theory that he had been guilty of contempt of Court." (He lost on that theory; we on the theory that we never owned what we all the time owned—What difference is there in *the result?* Each suffered injustice. How such "a trial" appears to this Court, is thus stated:)

"The mere statement of this proposition WOULD SEEM, IN REASON, AND CONSCIENCE, TO RENDER IMPERATIVE A NEGATIVE ANSWER. THE FUNDAMENTAL conception of a Court OF JUSTICE is condemnation ONLY AFTER HEARING. To say that courts have inherent power TO DENY ALL RIGHT TO DEFEND an action, and to render decrees WITHOUT ANY HEARING WHATEVER, is, in the very nature of things, TO CONVERT the Court, exercising SUCH an authority, INTO AN INSTRUMENT OF WRONG, AND OPPRESSION; and hence TO STRIP IT of that attribute OF JUSTICE, UPON WHICH the exercise of JUDICIAL power NECESSARILY depends—"

After holding that a cause must be decided *within* the issues—not *outside of* them—the Court continues.

Page 446. "There is *no* distinction in principle between determining a cause upon issues NOT raised by the pleadings, and rendering a judgment by REFUSING to permit a party to be heard in his defence, OR TO CONSIDER THE MERITS OF A SUFFICIENT DEFENCE."

In commenting upon the effect of Justice Truax's decision, the N. Y. Court of Appeals (151 N. Y., 320) by VANN, J., says:

"We think that the effect of a decision by the trial court, without expressing the facts found, *is the same as* if there had been a GENERAL verdict rendered by a jury; and that *the same presumptions* arise in its support."

While the sworn testimony of the trial Justice himself has substituted *the fact* for *presumption*,—even upon the position just stated, it will be seen whether or not the question of the validity of the releases works any estoppel here.

AIKEN *vs.* PECK, 22 Vermont, 260, HALL, J.

"Both these issues were before the court, and upon them" (*not without one of them*, as at bar) "the court rendered a GENERAL judgment, that the defendant was not trustee. * * *

But, upon WHICH of them, it was found, does NOT appear"—(It DOES appear at bar,—by the oath of the Trial Justice.)

"There being NO CERTAINTY therefore, that the question of WAS PASSED UPON by the court,—we think the Record COULD NOT constitute a bar to this suit, and that IT WAS PROPERLY EXCLUDED. Cited with approval in RUSSELL *vs.* PLACE, 94 U. S., 620, by FIELD, J.

But not only did the Trial Court *refuse to consider* this *chief* issue—for by oral arguments and briefs it was pressed with diligence;

But as already seen, he rendered his decision WITHOUT deciding as to that validity.

How far *such* a disposition of a case *should*, or *does*, take the place of an *actual* decision upon the merits, or work an estoppel, is familiar.

In BURLEN *vs.* SHANNON, 69 Mass., 392; the Court by SHAW, Chief Justice, says:

"It is ONLY when a fact is specially put in issue, traversed, AND TRIED, that a verdict and a judgment following it, ARE EVIDENCE against a party. Outram *v.* Morewood, 3 East, 346" and other cases.

LAST CHANCE MINING CO., *vs.* TYLER MINING CO., 157 U. S., 690, BREWER, J.:

"The ESSENCE OF estoppel BY JUDGMENT IS, that there HAS been a JUDICIAL DETERMINATION OF *a fact;* and the question ALWAYS is,—HAS there been SUCH determination?"

As to the fact whether these releases then are *valid*,—and should *stand;*—HAS there been *any such* TRIAL,—as. Chief Justice SHAW say swas necessary?

Has there been the "JUDICIAL DETERMINATION of" the fact of that validity required by this Court?

If not,—how does what was done constitute an *estoppel* by judgment?

Without going into proof, in the short space of this motion—as to *how* these releases *were obtained*, the conclusion of an eminent jurist, who has examined the facts exhaustively, will aid here. Ex-Chief Judge Andrews, of the New York Court of Appeals—before whom the Five-College case was heard upon appeal, and who wrote the dissenting opinion there—in his Brief before the Circuit Court of the United States in this present suit, says:

"The record shows that evidence was given on the trial, to sustain the issue of *fraud in procuring* the releases *of the most convincing character.*"

The nature of the transaction itself carries with it *irresistible* evidence *of overreaching* on the part of the *trustees*. They secured from the widow and next of kin releases of *an unquestioned* interest of about three million dollars, for the sum of $310,000, *paid out of* THEIR OWN *money*. The indignant language of Lord Cairns, in Thomson *v.* Eastwood, (2 Law Rep., App. Cases, 233), in a case where trustees had secured the discharge of a legacy of three thousand pounds, upon payment of three hundred pounds, is applicable in this case. "My Lords, that, of course, is a transaction which, unaffected by any question of length of time, or acquiescence, or change of circumstances could not be allowed in a Court of Equity for one moment."

Appeal was had from Mr. Justice Truax's decision to the General Term.

Its action is thus described by Ex.-Chief Judge ANDREWS :

"The General Term, confronted by the decision of Judge Truax that the case was taken out of the Statute of 1860 by the gift to the trustees, absolute in form, although in equity a gift to the 20 colleges, was called upon to pass upon this question. And it held that the Statute of 1860 *applied*, and that one-half of the estate, after deducting the personal legacies, was NOT validly disposed of by the will and codicils, but was distributable *to the widow and next-of-kin*, under the Statute.

This, as we have said, LEFT THE ISSUE of fraud in procuring the releases UNDETERMINED. But the Court, instead of *reversing* the judgmeet, *and directing the trial of this issue*, proceeded *itself* to decide the issue, and having found against the alleged fraud, affirmed the judgment.

THIS WAS SHEER USURPATION.

The ONLY power which IT could LEGALLY exercise, was to order *a trial of* this issue in a Court of ORIGINAL jurisdiction."

He quotes thus from BENEDICT *v.* ARNOUX, 154 N. Y., 126, HAIGHT, J.:

"It is one of the *fundamental* principles of our law, that questions of *fact* are to be tried and determined in a Court of ORIGINAL jurisdiction. And it is NOT an appropriate function of an APPELLATE Court to determine controverted questions *of fact*, and render final judgment upon SUCH determination."

That the Court of Appeals rested their opinion upon *a presumption*, and *not* upon the actual *facts*, appears from their own words.

Amherst College *et al.*, *vs.* Ritch *et als.*, 151 N. Y., 321, VANN, J.:

"We are of the opinion, therefore, that where the decision of the Special Term does not state the facts found (it did not here), and the judgment entered thereon has been affirmed by the General Term, upon an appeal to this Court, all the facts warranted by the evidence, and NECESSARY to support the judgments below, ARE PRESUMED TO HAVE been found."

As already seen, Justice Truax swore that he had NOT found them. Hence *the fact* contradicts *the presumption*. Yet, upon the *presumption*,—NOT upon the FACT,—*rests* the decision of the Court of Appeals.

At once, after the Court of Appeals decision I applied for a stay. They denied my motion that the remittitur be amended, by directing the Trial Judge to try the validity of the releases,—the *chief* issue in the cause, and which he swears that he had left untried.

I set forth in the moving papers there, the Constitutional ground, in these words (Vol. IV, page 122):

" The executor of the widow and the nieces believe that they have been 'deprived of their property without due process of law', in contravention of their rights, and of the great safeguard guaranteed to them by the Constitution—"

Remediless in the State Courts;

Where *the only one* of them that *could* try the case—DIDN'T;

And the only one that attempted to try it—COULDN'T;

And the Court of last resort based its decision solely upon A PRESUMPTION;

Which is now sworn by the Trial-Justice himself *to be exactly the opposite of the fact;*

Complainants,—citizens of Iowa, filed their present Bill.

Ritch, Buckley and Vaughan, and other defendants demurred.

Waiting about six months in an opinion showing great care and deliberation, Judge WHEELER said:

" As the proceedings went forward, the Special Term decided the case *upon a ground* which did NOT involve the determination of this issue of *fraud* in the procurement of the releases; AND THAT COURT APPEARS NOT TO HAVE, IN ANY WAY PASSED IN ANY MANNER upon the question."

At once Judge Lacombe granted an injunction as to the residuary estate.

Insert "A."

From the start Ritch, Bulkley, and Vaughan knew the facts which told the widow and nieces their rights and interests in this estate. They knew that the latter did *not* know them, and that, while swearing they three owned the residue *absolutely*, less the small personal bequests, it was *the widow and heirs*, not they three, who owned it.

In drawing said will, in the clause giving the widow her annuity, Ritch had inserted the words "*in the discretion of* my executors." They proved very helpful words in obtaining her release. For months they let her borrow money to buy even food to live upon, and gave her no dollar. As soon as she consented to withdraw her objections to the probate, and to release, they gave her thousands of dollars.

These *fiduciaries*, in obtaining these releases—contracts *uberrimæ fidei*—thus *prevented* the widow and kin *from presenting* these facts to the surrogate and to Justice Truax. They *so obtained* the decree of each. The great, well-defined exception to the rule of estoppel by *res adjudicata* is laid down by this court in U. S. *v.* Throckmorton, 98 U. S., 65, by Miller, justice, to be *obtaining* a decree by fraud—by anything that *prevented* the true beneficiary *from presenting* his or her rights. Which appears to render the *res adjudicata* theory inapplicable here, if it ever *had* any application. Beside asking to establish the true will, the bill and cross-bill plead another route, familiar to your honors. Leaving the probate undisturbed, you lay hold of the wrongdoers and require them to give the property to its owners. (Payne *v.* Hood, 7 Wall., Davis, J.; Barrow *v.* Hinton, 99 U. S., 83, Bradley, J.; Johnson *v.* Waters, 111 U. S., 667, Matthews, J.; Arrowsmith *v.* Gleason, 129 U. S., 101, Harlan, J., and Marshall *v.* Holmes, ——, ——, Harlan, J., are among the cases.)

*

Upon appeal the U. S. Circuit Court of Appeals reversed the injunction order.

The cause went to trial upon the special pleas filed by defendants, that the question of the title of this residue was *res adjudicata.*

In sustaining the pleas Judge Lacombe's language is peculiarly significant. He says:

(Volume I, page 259). "IT IS CONSTRAINED SO TO HOLD, by the decision of the Circuit Court of Appeals upon appeal from the order of injunction. IT MAY BE DIFFICULT TO FOLLOW THE REASONING by which that Court reached the conclusion that there HAD BEEN an adjudication, sustaining the proposition that the releases executed by the widow and next-of-kin were VALID, and NOT procured BY FRAUD; BUT THAT CONCLUSION WAS CERTAINLY REACHED, AND WAS EXPRESSED WITH NO UNCERTAIN SOUND.

"NO DOUBT THE ULTIMATE RESULT of the litigation in the STATE Courts HAS BEEN, BY REFINED TECHNICALITIES, to render INOPERATIVE, so far as THIS estate is concerned, the provisions of a Statute which seems to be the conception OF A WISE AND COMMENDABLE PUBLIC POLICY.

THAT circumstance however IS IMMATERIAL.

As the Court of Appeals expresses it, "Even if there *has* been a MIS-carriage of JUSTICE, (the parties) MUST SUBMIT."

It is thus seen that the Circuit Court of Appeals is divided—

That while Judges Wallace and Shipman say that we *have* had due process,—Judges Wheeler and Lacombe say that we have *not.*

Here read "Insert A"

Your Honors have thus a skeleton-outline of this litigation.

Of the State Courts,

The Trial Court frankly admits that IT NEVER tried what we claim to be the crucial question in the case—the validity of the releases.

That the General Term,—acting as a Court of ORIGINAL jurisdiction, rendered its work *ultra vires* and void ;

That the Court of Appeals *presumed* that the Trial Court *did* what it *never* did. And *rested* its decision upon such *unfounded* presumption.

In the Federal Courts,

Judge Wheeler saying in effect that we have *never* had due process.

Judge Lacombe, assenting, as was his duty, to to the mandate of the next higher Court ; yet making his position known in a manner unmistakable that we have *never* had due process.

Going to the unusual length of characterizing the work of the State Courts in a manner that is seldom seen.

In short

The only State Court that COULD try the case *not* trying it.

The only Federal Court that could– finding its hands tied by an interlocutory decision, gotten upon affidavits.

If there has ever yet been a trial of this case—*which* court did try it ?

And if not—in a case so rare as to be almost unique in the history of American jurisprudence, does it not come within the class of special and peculiar ?

When before have your Honors seen men get 88 per cent. of the property of others from them by giving them the other 12 per cent.—on the repre-

sentation that they owned nothing of it; when all the time they owned, not only the 88 per cent. but the 12 per cent. also?

Just what *was* the CONSIDERATION of THAT contract?

Is *this* method of getting one's property from him—*due* process?

We respectfully ask that the Motion to advance be granted;

And that this cause be set down for hearing upon such day in MAY or JUNE, 1904, as may suit Your Honors' convenience.

Respectfully submitted,

WILLIAM BLAIKIE,
Solicitor for John B. Reynolds, as Sole Executor of the Widow of said Testator.

March 14th, 1904.

FILE COPY.

Office Supreme Court U. S.
FILED
MAR 14 1904
JAMES H. McKENNEY,
Clerk.

Supreme Court of the United States,

EMMA S. FAYERWEATHER, and MARY W. ACHTER,
Appellants.

vs.

THOMAS G. RITCH, *et al.*, individually, and as Executors &c. and others—

No. ~~514~~ 157.

JOHN B. REYNOLDS as Sole Executor of the Last Will and Codicil of LUCY FAYERWEATHER, deceased,
Appellant,

vs.

THOMAS G. RITCH, *et al.*, individually and as Executors &c. and others—

No. ~~515~~ 158.

MEMORANDUM for Complainants and Cross-Complaints,——upon MOTION TO APPROVE, EFFECTUATE, and CARRY OUT—ORDERS UPON CONSENT,—made in the Circuit Court of the United States herein,—DISPENSING WITH printing A PART of the Record,—namely, Volumes V. VI. and VII. thereof,——

Statement of Facts.

Nov. 15th, 1890, at his home in New York City, Daniel B. Fayerweather died of consumption,—aged 68 years.

He left a wife,—Lucy Fayerweather, and no descendants.

His only heirs and next of kin were the three daughters of his brother, the late William Fayerweather of Iowa, namely, Mrs. Morris J. Beardsley, of Bridgeport, Conn. ;—and the appellants herein, namely, Emma S. Fayerweather, and Mary W. Achter, both of whom were citizens and residents of Muscatine, Iowa, when they commenced the present suit.

Said Daniel B. Fayerweather left an estate of upwards of $6,000,000. By his will of Oct. 6th, 1884, and its four *disclosed* codicils, he disposed of his property as follows, namely;

To the 20 Colleges named in the 9th Paragraph, in all	$2,100,000
" " 5 hospitals " " " 8th Paragraph in all	95,000
" his wife, Lucy Fayerweather, his house and stable, worth	100,000
" his wife, cash	10,000
" " Niece, Mrs, Lucy J. Beardsley.	100,000
" " " Emma S. Fayerweather.	20,000
" " " Mary W. Achter	20,000
Other specific personal bequests of, in all	31,600
Total to Institutions	$2,195.000
" " Wife	110,000
" " heirs	140,000
" " others	31,600

Total bequests, other than of residue....$2,476,000

He also gave his wife a *conditional* annuity of..... $15,000
" " " her sister, Mrs. J. B. Reyan annuity of..... $4,000

This suit in Equity was brought to recover so much of the residue as forms one-half of said Estate, less said personal legacies and about 12 per cent. given for the releases hereinafter mentioned —with interest thereon since said testator died.

When he made said Will, it gave away so much that it was doubtful if any residue remained. If any did, or accrued afterwards, by the 10th paragraph of said Will, it was to be divided among said 20 Colleges—share and share alike.

His lawyer, Thomas G. Ritch, who had been his legal adviser for about 15 years, drew this Will. He told the testator that Chap. 360 of the N. Y. Stats. of 1860, forbade a man, who left a wife, to *will* more than half his estate to such institutions.

He showed him how to get around this.

Sixty-seven days later, he drew, and Mr. Fayerweather executed the 1st Codicil. It took the residue from said 20 Colleges. It gave it to Ritch, and to Justus L. Bulkley and their heirs, *absolutely*.

At the testator's death, this residue exceeded $3,000,000.

Immediately after his death, his widow and said heirs began a contest of the Probate of said Will,—and of its disclosed Codicils. After a protracted trial, in which said Ritch, Bulkley, and a third executor, Vaughan, swore that *they* owned said residue, *personally*, *absolutely*,—Vaughan notified the widow *that he would use up the entire*

estate in litigation before she should get a dollar. She was *borrowing* money then to pay for her *food.* Ritch, Bulkley and Vaughan then offered her about 12 cents on the dollar if she would withdraw her objections, and give them a general release. She did so. Said nieces Emma S. Fayerweather and Mary Achter, accepted a similar offer. We understand that Mrs. Beardsley also released,—$125,000 having been paid to her husband before the death, and she getting said other $100,000 by said Will, and another $100,000 through an alleged gift, said to have been made on the morning of the day said testator died.

Volume VI, as to which this motion is made, is the Record of said Probate contest.

In June, 1893, 5 of said 20 Colleges sued said 3 Executors; the other 15 Colleges; the widow's executor,—she having died July 16th, 1892;—the heirs; and others claiming an interest;—in equity, in the N. Y. Supreme Court, in the action entitled, "The Trustees of Amherst College *et al. vs.* Ritch, &c., *et als*". The purpose of this suit was to fasten a trust upon the residue, in the hands of said Ritch, Bulkley, and Vaughan, in favor of said 20 Colleges; and, broadly, to determine who owned said residue.

Volume V, as to which this motion is made, is the Record of said suit at the Trial Term; at the General Term of the Supreme Court; and at the N. Y. Court of Appeals.

Volume VII contains a copy of the Briefs for the present Complainants and Cross-Complainant, as defendants in said suit of The Trustees of Amherst College *et al. vs.* Ritch, &c., *et als.*

June 29th, 1897,—in the Circuit Court of the United States for the Southern District of New York,—said heirs, Emma S. Fayerweather and Mary W. Achter, citizens and residents of Iowa, filed their Bill in Equity, against said Ritch, Bulkley, and Vaughan, individually and as Executors, before the latter had parted with said residue;—also against said 20 Colleges; and all other parties claiming an interest in said estate;—certain of said defendants being citizens of New York, and all of them of other States than Iowa.

They asked for their respective shares of said estate, (less what they had had,) upon the ground that, as he could not *will* but one-half to such institutions,—he had died *intestate* as to the *excess* over one-half,—save as to said small personal bequests; because their releases had been obtained from them by fraud and duress; and upon other grounds.

The widow's sole executor, John B. Reynolds—being a defendant herein,—filed his Cross-Bill in February, 1899, averring that the widow's release had been obtained by fraud and duress, on the part of said Ritch, Bulkley and Vaughan; by suppression of the facts known to them, but unknown to the widow and to her counsel,—which would have showed her her rights;—by misrepresentation as to the ownership of said residue; and asking that said release be declared void; and that her portion be paid to her estate.

Both said nieces and said Executor, beside other grounds, also claim herein that they have been deprived of their property in said estate, without due process of law; and without the equal protection of the laws.

They have duly appealed directly to this court

from the final decree of said Circuit Court of October 10th, 1902, sustaining the single plea of *res adjudicata*.

December 18th, 1903, they filed with the Clerk of this Court the Transcript of Record– consisting of Volumes I, II, III, IV, of in all 3348 pages, which contained the Pleadings and Proofs of all parties, save what is in Volumes V, VI, and VII, which also form part of the record.

But the last three are of a different character—in that as just seen, they are copies of records in *other* cases; namely:—Volume VI, the record of the Probate Contest;—Volume V the Record of the Suit of The Trustees of Amherst College *et. al. vs.* Ritch, &c., *et. als.*:—and Volume VII, the Briefs in the latter suit.

If used at all, they will serve merely as books *of reference*. As will be seen presently, the Circuit Court ordered that each party *extract from them* as desired, so as to *save* encumbering the record, and greatly increasing the expense of printing –And in short, did what it could, to have them entirely available to all, yet without the apparently senseless outlay of thousands of dollars; for what are, in many ways, in the nature of *model exhibits*. Complainants *have* so extracted freely. Defendants had 15 months to do the same, with nothing to prevent.

First Point.

THIS COURT CAN SUSPEND ITS RULE—requiring Twenty-Five Copies of the Record to be Printed—where its application WOULD BE INJURIOUS OR UNJUST.

Such has been the practice, ever since the estab-

lishment of this Court, and the Judiciary Act of 1789, empowering it to make its own Rules.

1796. GRAYSON *vs.* VIRGINIA, 3 Dallas, 320.

BY THE COURT:

"After a particular examination of the powers vested in this Court in causes of Equity, as well as causes of Admiralty and Maritime jurisdiction, we collect a general rule for the government of our proceedings; with a DISCRETIONARY authority, however, TO DEVIATE FROM that rule, where its application WOULD BE INJURIOUS or impracticable."

1854. FLORIDA *vs.* GEORGIA, 17 Howard, 494.

TANEY, Chief Justice:

"It would hardly *become* this tribunal, intrusted with jurisdiction where sovereignties are concerned, and with the power to prescribe its own mode of proceeding, TO DO INJUSTICE, rather than to depart from English precedents."

CALIFORNIA *vs.* SOUTHERN PACIFIC COMPANY, 157 U. S., 248.

FULLER, Chief Justice:

"The Court is NOT bound to follow this practice, when it would *embarrass* the case by *unnecessary* technicalities, OR DEFEAT the purposes of justice (Florida *vs.* Georgia, 17 How., 418)."

SOUTHERN PACIFIC COMPANY *vs.* HAMILTON, 54 Fed. Rep., 474.

MCKENNA, Circuit Judge:

"It is within the power of the Court TO SUSPEND its own rules, OR to EXCEPT a particular case from

them—TO SUBSERVE THE PURPOSES OF JUSTICE. (United States *vs.* Breitling, 20 How., 254)."

A familiar instance of this exercise of the Court's power to make a rule yield, where that course *will aid justice*, is seen in

KANSAS *vs.* COLORADO, 185 U. S., 144.

FULLER, Chief Justice—

"The general rule is that the truth of material and relevant matters, set forth with requisite precision, ARE admitted by demurrer. But, in a case of this magnitude, involving questions of so grave and far-reaching importance, it does NOT seem to us *wise* to APPLY that rule, AND WE MUST DECLINE to do so."

UNITED STATES *vs.* BREITLING, 20 How—254.

TANEY, Chief Justice—

"It is ALWAYS in the power of the Court TO SUSPEND its own rules; OR TO EXCEPT a PARTICULAR case from its operation, WHEREVER the purposes of JUSTICE require it."

This Court thus *has* ample *power* to SUSPEND its rules, where *not* doing so would work *injury* or *injustice.*

At Bar,—it would do *both.*

By June next, this litigation will have run for 12 years.

With never less than 19 sets of counsel, as in this case; and for years, over 30 sets; to 2 on ourside;

and now 3; ex Chief Judge Andrews of the N. Y. Court of Appeals, being our counsel;

In a contest of magnitude and importance;

Involving an estate exceeding six millions of dollars;

And many questions, some of great and far-reaching importance;

That the expense is heavy and oppressive, needs no proof.

Upon a twelve-years' burden, in a contest against such odds, to impose an addition of nearly four thousand dollars, before appellants may even have their cause *heard*, should have strong reason to justify it.

And to do *what?*

Merely to provide Your Honors with 19 copies of said Volumes V. VI. and VII.—*not* because you *want* them at all; or will probably *ever* use *one* of them;

But simply because the rule *says* so. A perfect reason of course—unless shown to *defeat* the *purpose* of the rule.

Of three books, copies of records and briefs in *other* cases, containing in all over 2600 pages (with a record *otherwise*, as just seen, of 3348 pages);

When it is doubtful if one of Your Honors will ever even *open* one of them;

There is no *need* of doing so;

For each counsel is at entire liberty to quote all he will from them in his brief;

And so to protect any right that that will aid;

Every interest is thus perfectly protected.

Where, purposely to provide, as far as he could, against an expense that he saw was needless, the Circuit Judge Ordered (Volume IV., page 639). "That any parties may print for the Record, or the

return, so much of the record in said Five College case (That is—said Case of The Trustees of Amherst College, *et al.*, *vs.* Ritch, &c., *et als.*), as they may desire, for the convenience of parties, or for the Court;

Where in the same Order, he made similar provision as to the Probate Record;

Where he further Ordered that both said Records "need NOT be printed at length, either for final hearing, OR FOR RETURN, either to the Circuit Court of Appeals, OR TO THE SUPREME COURT OF THE UNITED STATES. But, that ONE copy MAY BE used upon final hearing, and certified, attested, OR IDENTIFIED, in LIEU thereof"

When in accordance with said Order, and at the Judge's direction, John A. Shields, Esquire, the Clerk of said Circuit Court, in his Certificate, (Vol. I., p. 1), bringing up the Record herein, instead of, as usual, *certifying*—states as follows;

"AND I IDENTIFY said Probate; State Court Record; and said Books of Briefs, as copies of the Books and Records, referred to in the Order of July 18, 1891, of Hon. E. Henry Lacombe, United States Circuit Judge, (See Vol. I., Page 639) "As to which Volumes V, VI, and VII, said Order, as just seen, provided, that the same NEED NOT BE printed, at length, for return, either to the Court of Appeals, or TO THE SUPREME COURT OF THE UNITED STATES;

But that One copy might be used upon final hearing—as it was—and certified, attested, OR IDENTIFIED, in lieu thereof—"

Said Clerk further showed, in an unmistakable manner how *he* understood that these Volumes were to go up, by thus not only merely IDENTIFYING—instead of certifying—them;

But—like the big natured man he is—knowing what odds these appellants have had to face here—BY DECLINING TO TAKE ONE DOLLAR for his folio-charges therein—where his fee otherwise would have approached a thousand dollars ;

Where *defendants* even did not ask him to compare them, for Volumes VI and VII are books which THEY furnished him ;

Mr. Parsons—leading Counsel for Defendants—(Vol III, page 5), STIPULATED upon the Record that the Case upon appeal in The Trustees of Amherst College, *et al.*, *vs.* Ritch, &c., *et als.*,

"May be used upon the final hearing, WITHOUT incorporating them in the Record physically ;"

After hearing a Motion last August, made inadvertently (before this appeal was taken), that one copy of said Briefs suffice upon this Appeal, Judge Lacombe handed down the following Memorandum.

"I am *entirely* satisfied that this motion is one WHICH SHOULD BE granted ; But I am equally clear that I have no *power* to entertain it. If no appeal has been taken, there is no ground for making it. If appeal has been taken, it is for the appellate Court alone to decide how much of the Record shall, or shall not be *printed*."

As this appeal in this way brings up EVERY WORD OF defendant's testimony, and of all testimony ;—all their rights are protected ;

And no harm is done to any one.

As they themselves supplied us with these very Volumes VI. and VII, now on file with the Clerk of this Court herein, their contents are as much in their knowledge as ours ;

They are probably even *more* familiar with the

other one of these 3 books, namely—Volume VI, that is, the Probate Record ; For some of them had much to do with that Record ; and helped largely to make it ; while no one upon *our* side had anything to do with it.

We have extracted freely from said 3 books, under said Order of Judge Lacombe. If they have not done the same, having had over 15 months in which to do so, it suggests that there is no part which they thought it important to emphasize ; or perhaps even mean to use ; Though always, if they do, here it is, ready at hand for reference, or for quotation into their briefs.

Said Volumes V., VI. and VII. are thus practically like Model-Exhibits,—as a plough, or a locomotive would be ;—or a dictionary, cyclopædia, or atlas,—with the same reason for a single copy sufficing, as in a model exhibit.

If either of Your Honors cares to look into one of them,—it will scarcely inconvenience the others to wait until he has done so.

But the brief will doubtless save you the need of so looking.

As defendants, then, do not need to be served with a copy, of *their own* books.

Your Honors will likely have either very little, or more probably, *no* use whatever for them.

The possible losers would narrow down to the Law Libraries, and other recipients of the 19 copies of a case, usually supplied to this Court, which Your Honors do *not* want ;

But already those very recipients *have had* their copies of Volume V, namely, when the extra copies

thereof were, under the State Rule, handed to the Clerk of the N. Y. Court of Appeals.

Of Volume VII. the same.

And of the Probate Record,—namely Volume VI, there is small likelihood that any lawyer outside of this case will want to look that up. If he does, he will find it in the Probate Clerk's Office. Or a line to any of the Counsel will be apt to provide him with one.

We did not condense Volumes V, viz: the Amherst v's. Ritch record; Volume VI, viz: the Probate Record; or Volume VII, viz: the Book of Briefs; under the Rule for condensation;

1, because, not *we*, but *defendants* offered Volumes V and VII.

2. And because we, who offered Volume VI, thought that the claim would be made that a certain fact was brought out in that Probate Contest, which could be disproved *only* by having the *whole* record of it in Court. Then, if such fact appeared upon the record, its location there could be at once shown,—if it *has* any location.

Also because, when (Vol. II, p. 951) we offered Vol. VI, Mr. Bovee said "I think we will give you the stipulation"; and no withdrawal has ever been suggested since.

All solicitors had been duly notified to attend taking these proofs.

(See Vol. II, pages 1, 2, 3, and 4.)

Defendants divide into 3 classes, viz.

1. The 5 hospitals named in the 8th paragraph of the will.
2. The 20 Colleges named in the 9th paragraph of the will.
3. The 3 Executors, Ritch, Bulkley, and Vaughan.

And Northwestern University, which goes in with the 2nd class.

Each and *all* rest their defence upon the *single* plea—of *res adjudicata.*

All desire the *same* decision.

No doubt, for this reason,—a majority of them did not attend the hearings; pleased to have as able leaders as Mr. Parsons, Mr. Root, and Mr. Bovee, care for their interests; register their objections; and do whatever else was to be done.

It would have been idle for the others to merely *repeat* what these leaders said. So it was *not* done.

We did the same upon *our* side.

As the interests of Complainants and Cross-Complainant are, in most ways, similar—of our two solicitors—sometimes Mr. Roger Sherman—at other times, I,—conducted the examinations for both.

This seemed the sensible, direct way to get the work done as compactly and speedily as possible; not clogging the record with ceaseless repetitions; yet protecting the interests of all.

All defendants wanted Volume V in the Record. Some of them wanted *parts* of Volume VII; while others wanted *all* of it.

That all thought the present plan of having but *one* copy of Volumes V, VI, and VII should suffice, appears from the various steps taken by defendants themselves; by the Court; and by the Clerk in making up the Record under the eye of the Court—and with all counsel for both sides present who cared to be.

Here is what was done.

I.—Mr. Root, Counsel for Hamilton College, submits a separate copy of the Amherst v's. Ritch record, Vol. V "as a SEPARATE volume."

The quoted words are *his own.* They show that he did *not* mean Volume V to be a *part of* the record, in the usual sense. But, as he says, "a SEPARATE volume."

This appears again by his next words, namely. "ACCOMPANYING this testimony"—"Not constituting *a part of* it. But going with it, as any other outside matter might go. As one's friend might *accompany* him. But he would not form *a part of* him.

II.—Mr. Parsons next STIPULATES that Volume V MAY BE used upon * * * ANY appeal herein."

In his next sentence he removes all doubt—if there ever was any.

"WITHOUT incorporating them in the Record physically."

Does this mean WITH incorporating them?

And WITHOUT so incorporating, is what we ask now.

III.—Then Judge Lacombe Orders—as far as he can in his Court—that Volumes V and VI "NEED NOT BE PRINTED at length, either for final hearing; or for return to the Circuit Court of Appeals; OR TO THE SUPREME COURT OF THE UNITED STATES."

To make it doubly plain, he then adds.

"but that ONE copy may be used upon final hearing, and certified, attested, OR IDENTIFIED, IN LIEU THEREOF.

Thus, "IN LIEU of" the common way, he says that ONE copy shall suffice.

He goes still further. He concludes thus. "And

that any party may *print* FOR THE RECORD, OR THE RETURN, so much of the Record in said Five-College Case as they may desire, for the convenience of the parties or for the Court."

Why say *that*, if, instead of such *extracts*, they were to print THE WHOLE OF the Record?

IV.—Next, in the Motion of August, 1904, as to ONE copy of the Book of Briefs sufficing, as it had already been provided by said order that ONE copy of Volumes V and VI might suffice.

The justice of the motion seemed to Judge Lacombe so obvious, that he said in words, unmistakable in their meaning,

"I am entirely satisfied that this motion is one which *should be* granted." After stating that he, however, has no *power* to grant it, he concludes, "It is for the Appellate Court alone to decide *how much of* the Record shall, or shall not be *printed*."

V.—Finally, the Clerk, whose duty it was to make up the Record, and who made it up under the Judge's eye, and with all counsel attending who cared to do so—What does *he* do?

He refers directly and specifically to said Order of Judge Lacombe's as his guide and authority. Then he obeys it. And not as with the other Volumes—I, II, III and IV at all; contents himself with simply *certifying*—as in the usual way.

But does an *entirely different and unusual thing*. Yet just what the Court's order said to do, namely: he IDENTIFIED Volumes V, VI and VII.

He did not *identify* Vols. I, II, III and IV. He *certified* them.

Bearing these facts in mind; and that under the

Insert "B."

In the State trial three copies of the case on appeal to the general term were served upon *each* attorney for any defendant; also three copies of the case on appeal to the court of appeals. The latter *was* the former, with the record of the action of the general term attached, namely, its opinions, decision, and judgment.

As said opinions, decision, and judgment *are all in volume I and all solicitors here have thus had* 6 *copies of the rest of volume V*, the need of putting us to the expense of nearly $4,000 now—*not* to give *one* copy to *each* of the *twelve* solicitors for defendants who have appeared so far in this court, *but to Mr. Bovee alone*—is not obvious. *He gave us* the one your honors have. Is it possible that he has not one left? If not, as we have two and will gladly give him one, why ought not that to suffice?

Should the court need more than one, we also served fifteen sets of attorneys who appeared in the State courts for the "deed-of-gift" donees. We are confident that we can readily get from some of these fifteen the numbers your honors may suggest if the one now on file will not suffice.

When these three men found that they three suddenly "owned absolutely" over $3,000,000 for no possible reason the public could understand, Mr. Parsons drew a "deed of gift" of it for them, and tried to give it to a set of donees in whom his own interest was so ample that it will much enliven your honors' labors when you investigate this case.

General Order of May 16th, 1902 (See Vol. IV., page 657), all defendants have adopted either the Proofs of Hamilton, or those of Ritch, Bulkley and Vaughan; it will be seen that, after these stipulations, and said Order, and Certificate, no defendant can now honorably repudiate the understanding; or undo the estoppel, which his own conduct has thus directly brought about.

Nor is it likely that any one is thinking of doing so.

Indeed the letters of several of the Counsel to me upon the subject say that they do *not* propose to file any brief to oppose this motion.

Here, for example, are the words of one of them—a man known to Your Honors, and held in universal esteem at our Bar. Under date of the 24th ult., General Thomas H. Hubbard, counsel for Bowdoin College, writes thus:

> "*Dear Mr. Blaikie.*—Answering your inquiry under date of February 23rd, in respect to briefs in the Fayerweather case, I beg to say that I do not intend to oppose the motion, or submit any brief. It seems to me you have already *printed* quite enough."
>
> (The italics are mine.)

And Mr. Bovee wrote in effect that his desire rather was, to have this Court say, if we might dispense with the printing of Volumes V, VI and VII; as the rule *ordinarily* requires it.

Here read "Insert B"

Weighing then the possible inconvenience or privation, that not supplying the 24 other copies of these bulky volumes would cause—against the saving to these appellants the—to them—formidable outlay of nearly $4,000, of what seems

an idle and needless waste of money; and bearing in mind always that no apparent harm, of which we are aware, can come, to any one, by thus not clogging the archives of this Court with this voluminous addition; and as to do otherwise would, in the words of this Court, in Grayson *vs.* Virginia (*supra*), be highly "*injurious*" to appellants; and very close to the border line of "unjust" also, if not squarely over it;

We respectfully ask your Honors to approve, effectuate and carry out said stipulations and order by *suspending* the part of the rule requiring 25 copies of Volumes V, VI, and VII, to be printed and served; and that you direct that the copy of each of said volumes now upon the files of this Court herein, for all purposes, suffice.

That the Clerk of this Court be instructed to omit his folio-charge for printing and supervising said Volumes V, VI, and VII; as the Clerk of the Circuit Court of the United States herein did. And for such other relief as may be just.

Dated March 14th, 1904.

Respectfully submitted,

WILLIAM BLAIKIE,
Solicitor for John B. Reynolds as Sole Executor of the Will and Codicil of Lucy Fayerweather, deceased, Appellant.
And of Counsel for the Complainants-Appellants.